NOV 27 1995
CLERK

No. 95-629

In The

Supreme Court of the United States

October Term, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,

Petitioner,

vs.

SOMERSET COUNTY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM R. FISHER
Counsel of Record
MONAGHAN, LEAHY, HOCHADEL & LIBBY
Attorneys for Respondents Wilfred Hines, Rene Guay, Tommy Giroux, Jr. and William Crawford, Jr.
P.O. Box 7046
Portland, Maine 04112-7046
(207) 774-3906

5295A
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the First Circuit Court of Appeals correctly held, as a matter of law, that competent police officers possessing the same information the defendant officers had on May 15, 1992, reasonably could have believed that probable cause existed to arrest Katherine Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin.

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

John M. Hegarty, as Personal Representative
of the Estate of Katherine A. Hegarty, and
Individually

Petitioner.

Sergeant Wilfred Hines
Deputy Rene Guay
Reserve Deputy Thomas Giroux, Jr.
William Crawford, Jr.
State Trooper Gary Wright

Respondents.

The Petitioner has incorrectly listed Somerset Sheriff Spencer Havey as a party in his Petition. (Petition, p. ii). Spencer Havey *is not* a party to the Petition. Indeed, the Petition contains no legal argument concerning Spencer Havey's liability.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Katherine Hegarty Shoots At The Campers	1
B. The Campers' Call For Help	3
C. The Officers Respond To The Campers' Call	4
D. The Officers Interview The Campers	5
E. The Officers Walk In Toward The Cabin	7
F. Hegarty's Behavior at the Cabin	9
G. The Warrantless Entry by Sergeant Hines	11
H. Hegarty's Threat of Deadly Force	11
Summary of Argument	13
Reasons for Denying the Writ	13

Contents

Page

I. The First Circuit Correctly Applied the Controlling Precedents When It Held, as a Matter of Law on the Undisputed Material Facts, that the Conduct of the Defendant Officers Was Objectively Reasonable. 14

A. The Standard of Review for the Officers' Immunity Claims 14

B. The Qualified Immunity Doctrine 15

1. Probable Cause 16

2. Exigent Circumstances 17

II. Even if the Court Determined that *Johnson v. Jones* Applied Retroactively to This Case, the First Circuit's Decision Granting the Defendant Officers Qualified Immunity Was Proper. 20

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 15, 18

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 14

Contents

Page

Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949) 17

Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984) 15

Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87 (1st Cir. 1994) 14

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed. 2d 443 (1989) 16

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 15

Hunter v. Bryant, 502 U.S. 224, 111 S. Ct. 534, 116 L. Ed. 2d 589 (1991) 15

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) 17

Johnson v. Jones, __ U.S. __, 132 L. Ed. 2d 238 (1995) 13, 20, 21, 22, 23

Stella v. Kelley, 63 F.3d 71 (1st Cir. 1995) 22

United States v. Adams, 621 F.2d 41 (1st Cir. 1980) 18

United States v. Almonte, 952 F.2d 20 (1st Cir. 1991), *cert. denied*, 503 U.S. 1010, 112 S. Ct. 1776, 118 L. Ed. 2d 434 (1992) 18

Contents

Page

Statutes Cited:

17-A M.R.S.A. § 211 ..... 5, 16

17-A M.R.S.A. § 1252(4) 5

25 M.R.S.A. § 2801, *et seq.* 13

28 U.S.C. § 1291 14

42 U.S.C. § 1983 ..... 16, 21

United States Constitution Cited:

Fourth Amendment 15

Rule Cited:

Supreme Court Rule 15 1

STATEMENT OF THE CASE

The Petitioner has misstated and omitted facts that bear on the question of what issues would properly be before the Court if a Writ of Certiorari was granted. Pursuant to Supreme Court Rule 15, the Respondents will identify the Petitioner's material errors and omissions.

The Petitioner argues that the First Circuit "improperly resolved factual issues and failed to construe the record in the light most favorable to the Plaintiff." (Petition, p. 18). He asserts that the First Circuit erred by "significantly overstating" Katherine Hegarty's mental condition at the time of the underlying incident (Petition, p. 19); that the appellate court "grossly distorted" the four campers' reaction to the shots fired by Hegarty (Petition, p. 20); and that there is "substantial evidence" that Hegarty was not "distraught" or "flipped out." (Petition, p. 21). Rather, he claims that she was "justifiably upset" that the campers had camped "without permission," had "trespassed on her property," and had "started an illegal fire." (Petition, p. 21). These assertions are utterly without merit.

The truth is that the facts of this case are undisputed. They were undisputed on May 15, 1992. They were undisputed when the Petitioner filed suit. They were undisputed when the District Court rendered its decision. They were undisputed at the First Circuit Court of Appeals. The facts of this case are still undisputed. The Petitioner cannot escape this fundamental truth by distorting the undisputed evidence in this case.

A. Katherine Hegarty Shoots At The Campers

During the morning of May 15, 1992, four campers arrived at their campsite and set up camp. App. at 1001a. At around 9:00 that evening, Katherine Hegarty became extremely upset when

she saw the campers returning to their campsite for the night. App. at 1222a. She accused them of trespassing on her property and of scaring her birds and animals. App. at 571a, 600-01a, 1222a. The campers assured her that they had permission to camp on the paper company's property. App. at 1222a.

The campers told Hegarty that they would leave first thing in the morning. Hegarty told them that they could leave "only if I let you leave." App. at 572a, 601a, 614a. She then started shooting at them. App. at 1223a. Hegarty would shoot five or six rounds at the campers, go into her cabin, turn the lights on, reload, turn the lights off, go back outside and shoot five or six more rounds at them. App. at 572-73a. She repeated this process five or six times. App. at 1223a.

The campers thought that Hegarty was using both a rifle and a pistol and that she might have been drinking. App. at 572-73a, 601a, 613a. She shot at the campers for approximately 1 to 1-1/2 hours. App. at 219a. When Hegarty started shooting, the campers were in front of their lantern by a fire. App. at 572a. Three of them took cover behind their truck, the other behind the stream bank. App. at 601a. Throughout this time, Hegarty was either talking to herself or someone else in the cabin. App. at 572a.

The campers were eventually able to figure out Hegarty's reloading pattern. App. at 1223-24a. On one occasion when she went into the cabin to reload, the campers jumped into their truck and sped down the Holeb Road. App. at 613-14a, 1224a. As the campers passed by the Hegarty cabin at a distance of approximately 50 or 60 feet, Hegarty came out, stood on the front porch and pointed a rifle at them. App. at 573a, 601a, 614a. They could not tell if Hegarty shot at them as they drove by her cabin because they were travelling "unbelievably fast." App. at 573a, 601a, 614a, 1224a. The noise caused by the truck might have covered up the sound of a gunshot. App. at 573-74a, 601a, 614a.

After the campers sped past the Hegarty cabin, she got into her own vehicle and pursued them down the Holeb Road. App. at 573a, 613-14a. The campers were "scared to death" when they had to get out of their truck and unfasten a cable strung between two stone pillars as Hegarty continued to pursue them. App. at 573-74a. The campers then retreated to a truck stop located on Route 201. App. at 670a.

B. The Campers' Call For Help

At the truck stop, one of the campers called the Somerset County Sheriff's Department and told the dispatcher that "we got a lady shooting *at us* in the woods." App. at 668-72. (emphasis added). He told the dispatcher that he and his companions had been at a campsite that was "registered with the State." *Id.* He went on to explain that he had "no idea if she is following us," but that she had a "loaded gun," that she was "drunk" and "flipped right out." *Id.*

Deputy Rene Guay of the Somerset County Sheriff's Department was in his cruiser in Bingham, Maine, when he received an urgent radio call from his dispatcher concerning the camper's complaint. App. at 241-42a. The dispatcher told Guay that a woman had fired approximately 30 bullets at four campers and that they had fled to a truck stop in Jackman, Maine. App. at 600a. The dispatcher also told Guay that the campers feared that the woman who shot at them would follow them to the truck stop. App. at 242a, 600a.

Guay asked the dispatcher to send Somerset County Reserve Deputy Tommy Giroux to the truck stop and that Guay would meet him there. App. at 242a, 600a. Guay then called Maine State Trooper Gary Wright by radio and requested his assistance with the complaint. App. at 575a. Sergeants Wilfred Hines and William Crawford of the Sheriff's Department were also

instructed to respond to the camper's complaint. App. at 192a, 571a, 588a.

C. The Officers Respond To The Campers' Call

Giroux, who lived 1-1/2 miles from the truck stop, went there and interviewed the campers until the other officers arrived. App. at 77a, 611a, 613a. After the campers described for him the location of the camp and the woman who did the shooting, Giroux concluded that the woman was Katherine Hegarty. App. at 76a, 245a, 612a. Hegarty lived on the Mill Road in Jackman, and Giroux had known her for 14 years on a first-name basis. App. at 612-13a. She was a registered Maine Guide with a reputation as a "crack shot." App. at 78a, 612a.

When Deputy Guay got to the truck stop, the campers were inspecting a boat on the pick-up truck for bullet damage. App. at 612a, 613a. They thought that a mark on the bow might have been caused by a bullet. App. at 572a, 602a. The campers were visibly frightened. App. at 76a, 612a. Sgt. Wilfred Hines and Trooper Wright arrived a short time later. App. at 571a, 614a, 615a. Crawford called the officers at the truck stop by radio and arranged to meet them at the intersection of Route 201 and the Holeb Road. App. at 588-89a. That intersection was approximately 1 to 1-1/2 miles from the truck stop and 3.1 miles from Hegarty's cabin. The Holeb Road was an unimproved dirt road. App. at 615a.

Giroux briefed Hines, Guay and Wright on what the campers told him Hegarty did. App. at 571a, 600a, 614-15a. Hines was the senior Somerset County officer at the scene. App. at 571a. Guay and Giroux told the other officers that they were certain that Katherine Hegarty did the shooting. App. at 245a, 574a, 601a, 614-15a. Trooper Wright told the other officers that he had dealt with Hegarty before, that she knew how to use a gun, and that she could be violent and extremely aggressive. App. at 575a.

D. The Officers Interview The Campers

Giroux, Guay and Hines interviewed the four campers as a group. App. at 571a, 600-01a, 613a. The campers told the officers about the shooting and that they were afraid that Hegarty would pursue them to the truck stop. App. at 245a. Guay and Giroux were very familiar with the area the campers described. App. at 613a, 602a. However, all of the officers knew approximately where the campsite was located. App. at 571-72a, 602a. It was on paper company property a "stone's throw" from Hegarty's cabin. App. at 613a.

The campers told the officers that there were other campers in the area. App. at 1233a. They did not know for sure if there was anyone else near the Hegarty cabin on the opposite side of Sandy Stream. App. at 204-05a, 574a. Guay knew of at least one other campsite on the other side of Sandy Stream close to where the four campers had been camping. App. at 602a. Consequently, the officers concluded that they had to assume that there were other campers near the cabin. App. at 204-05a, 577-78a, 602a. Giroux knew from experience that the woods were usually "full of people" if the campsites close to Route 201 were occupied because May was a good month for trout fishing. App. at 615a.

Sgt. Hines decided to arrest Hegarty for shooting at the campers. App. at 574a, 603a. The officers concluded that Hegarty could conceivably be charged with at least the offense of reckless conduct with a firearm in violation of 17-A M.R.S.A. §§ 211 & 1252(4). App. at 574a.

Hines, Guay, Giroux and Wright were all familiar with Hegarty's history of mental instability and aggressiveness. App. at 304-06a, 575-76a, 601-02a, 612-13a. Trooper Wright had previously arrested Hegarty twice in one evening in November 1991. App. at 303-04a. Her first arrest was for operating under the

influence in Jackman. App. at 303a. When Wright arrested her, Hegarty attempted to reach for a weapon. App. at 377a, 602a. Later that same night, Hegarty showed up at Wright's house and assaulted him. App. at 304-05a, 602a.

The officers also knew that Hegarty had been involuntarily committed to a hospital for a "psychotic breakdown" in the fall of 1991, and that the EMT crew had to "gang tackle" and sedate her on that occasion. The EMT crew reportedly saw a great many firearms in Hegarty's home. App. at 306a, 576a, 612-13a.

While at the truck stop, the officers formulated a plan of action for dealing with Hegarty, which they characterized as "locate, identify, contain, negotiate and arrest." App. at 193a. Once in custody, she would be referred out for a psychological evaluation. App. at 193a.

The officers considered the possibility of a warrantless entry into Hegarty's cabin. Hines would decide if circumstances justified a warrantless entry. App. at 194a. If necessary, Hines and Wright would conduct the entry. App. at 194a. They were the most experienced officers, and they had worked closely with each other in the past. App. at 575a. A warrantless entry would be made only as a "last resort" in the event that the plan, as formulated, proved ineffective. App. at 194a. A warrantless entry would only be made at the "safest opportunity" for both the officers and Katherine Hegarty. App. at 194a.

Sgt. Hines understood that exigent circumstances would have to be present to justify a warrantless entry into the Hegarty cabin. App. at 194a. Sgt. Hines intended to tell Katherine Hegarty that she was under arrest. App. at 202a. However, he had been trained at the Maine Criminal Justice Academy not to tell a subject that they were under arrest if doing so placed the life of an officer, or some other person, in danger. App. at 219a.

After the officers completed their preparation at the truck stop, they drove to the intersection of Route 201 and the Holeb Road to await Sgt. Crawford's arrival. App. at 576a, 589a. When Crawford arrived, he was briefed on the nature of the campers' complaint, the plan of action, and told that Hegarty probably did the shooting. App. at 130-31a, 140a, 589-90a. He was warned that Hegarty was potentially violent, aggressive, and known to possess firearms. App. at 589-90a. The briefing led Crawford to conclude that Hegarty had intended to harm the campers. App. at 590a.

After Crawford was briefed, the officers drove down the Holeb Road toward the Hegarty cabin. App. at 590a, 615-16a. At that time, the County cruisers did not have radio communications with the Sheriff's Department due to the remoteness of their location. App. at 139a, 590a.

E. The Officers Walk In Toward The Cabin

The officers parked their cruisers on the Holeb Road approximately seven-tenths of a mile from the Hegarty cabin. They walked the rest of the way in on foot because Hines thought that the sight of police cruisers might provoke a violent response from Hegarty. App. at 578a, 615-16a. Trooper Wright led the way in with his police dog. The dog was brought along to alert the officers to potential danger in the event that Hegarty was outside her cabin. App. at 298-99a, 578a, 591a, 603a. Although it was after dark, it was a clear night and there was a full moon. App. at 577a. The officers observed a number of occupied campsites along the Holeb Road. App. at 577a, 616a.

When the officers reached the vicinity of the Hegarty cabin, they did not know where Hegarty was, and they were unable to determine if there was anyone else within eyesight of the cabin. App. at 577-78a. The cabin lights were off, and they could not see

anyone inside. App. at 603-04a. The area around the cabin was wide open, and Canadian music could be heard playing loudly on a radio. App. at 205a.

Giroux took a position behind a tree 91 feet from the front of the cabin. App. at 90a, 111a, 616a. Wright and Crawford went to the right side of the cabin. Hines and Guay went to the left side. App. at 578-79a, 591-93a, 616a. Once the officers were in position, Giroux repeatedly shouted words to the effect of "Kathy Hegarty, this is Tommy Giroux, I'd like to speak with you. Please open the door so that I can talk to you." App. at 616a. He shouted to Hegarty for what seemed like a "long time" without any response. App. at 617a.

Hines eventually took up a position on the front porch of the cabin near the door. Trooper Wright stood to his right. App. at 209a, 578-79a. Hines knocked repeatedly on the cabin door with his flashlight and identified himself by name as a law enforcement officer. App. at 579a. He told Hegarty that he wanted to speak with her, and he asked her to come to the door. App. at 579a.

Crawford checked a pickup truck in the front yard to ensure that no one was in it, after which he checked the perimeter of the cabin. App. at 591-92a. After completing his first check, Crawford told Hines that he would recheck the windows on the left side of the cabin. App. at 592a. Crawford could hear Giroux repeatedly identifying himself and asking Hegarty to exit the cabin. App. at 591-92a. He told Giroux that anyone inside the cabin might not be able to hear him because the radio was playing so loudly. App. at 144a. Giroux thereafter took up a position behind the pick-up truck 23 feet from the front of the cabin. App. at 91a.

F. Hegarty's Behavior at the Cabin

When Crawford shined his flashlight into a window on the left side of the cabin, Hegarty pointed a rifle "right in [his] face." App. at 144-45a, 592-93a. Scared, he dropped to the ground and yelled, "Don't go in. She's got a gun." App. at 145a, 593a. All the officers heard Crawford's warning. App. at 309-10a, 579-80a, 604a, 617a.

After Crawford dropped to the ground, he heard Hegarty ask, "[W]ho are you?" App. at 145a. The radio then became inaudible. App. at 145a. Crawford, who was in full uniform, identified himself by name as a law enforcement officer and replied, "Kathy, we want to talk to you." App. at 145a, 147a. Meanwhile, Giroux continued calling to Hegarty, and Crawford heard her walk to the front of the cabin. App. at 145a. Crawford stayed put and attempted to regain his composure because he was "scared to death." App. at 146a.

After hearing Crawford's warning, Hines feared that Hegarty might use her weapon against the officers. App. at 579a, 582a. He concluded that it would not be safe for the officers to retreat from the cabin because the area around it was wide open, there was no cover readily available, and it was a bright moonlit night. App. at 258a, 579-80a. If they retreated, they would be clear targets for anyone inside the cabin. App. at 579-80a. Hines concluded that the officers had to stay next to the cabin where they were partially concealed. However, the cabin walls were very thin, and Hines was afraid that they could be shot directly through the cabin walls. App. at 580a.

Hines never told Hegarty that she was under arrest because he "did not want to get shot through thin camp walls." App. at 202a. By this time, Hines was very concerned about Hegarty's "mental stability." App. at 219a. The decision not to tell Hegarty

that she was under arrest was not a joint decision by the officers. App. at 219a.

Giroux continued encouraging Hegarty to talk to him. App. at 617-18a. When Hegarty asked Giroux what his intentions were, he said, "Katherine, you know me long enough that my intentions are honorable." App. at 91-92a, 256a. Giroux was certain that Hegarty knew he was there. App. at 92a, 618a. Guay, who also knew Hegarty, identified himself, told Hegarty to turn the lights on, to leave the cabin, and told her that he was concerned for her well being. Hegarty responded by making unusual sounds and laughing "like a witch." App. at 604-05a.

Earlier that night, Trooper Wright told the other officers that he had received a complaint from Augusta dispatch concerning burglaries in the Crocker Pond area. App. at 256a, 605a. Crocker Pond was near the Hegarty cabin. App. at 605a. Guay told Hegarty that the officers were investigating camp burglaries and that they had reason to believe that she might have seen someone that night. Hegarty told Guay that she had not seen anybody. App. at 256a, 580-81a, 605a, 618-19a.

After a short time, Hegarty said to Guay in a sing-song voice words to the effect of, "I can see you." App. 605-06a. While she spoke to Guay, Hegarty was kneeling on a couch with her face pressed up against the front window. She smiled at Guay with an unusual expression on her face. Guay shined his flashlight in the cabin window, thereby illuminating Hegarty's face and her immediate surroundings. App. at 256-58a, 605-06a.

All four of the Somerset Officers at the scene identified themselves by name as law enforcement officers to Katherine Hegarty. App. at 92-93a. All of them were in uniform that clearly identified them as law enforcement officers. App. at 214a. Guay was wearing a jacket with a badge on the front, arm patches, and a tan shirt with a badge on it. App. at 82a, 212a, 252a.

G. The Warrantless Entry by Sergeant Hines

The officers continued their attempts to communicate with Hegarty to no avail. App. at 257a, 605-06a. They repeatedly asked Hegarty to turn the lights on, to exit the cabin, and told her that it was safer for everyone if she complied with their instructions. App. at 257a, 606a. They repeatedly told her that it was safer for her and the officers if she did that. Hegarty responded by laughing "like a witch." App. at 580a, 593a, 606a, 617-19a.

From a side window, Crawford saw Hegarty kneeling on the couch looking out the front window at Deputy Guay. No weapon was in sight. App. at 594a. Guay also checked the area around Hegarty, and he did not see a weapon either. App. at 606a. Guay feared that Hegarty might go back into the room where he thought the weapon was located. App. at 606a. Not seeing a weapon, he said to Sgt. Hines, "she doesn't have a gun, go." App. at 582a, 594a, 606a, 619a.

Given his training, education and experience, Sgt. Hines concluded that both probable cause and exigent circumstances justifying a warrantless entry into Hegarty's cabin existed on May 15 and 16, 1992. App. at 584-85a. Believing there was an opportunity to safely separate Hegarty from her weapons and arrest her, Hines pulled open the screen door to the cabin and repeatedly kicked the front door. App. at 582a. A chain lock kept the door from opening all the way. App. at 582a. The door case split, causing the door to spring back so that it almost closed. App. at 582a.

H. Hegarty's Threat of Deadly Force

As Hines attempted to enter the cabin, Guay saw Hegarty get up off the couch, pick up a rifle, and begin walking backward

while looking toward the door. Her left hand was on the rifle forebarrel, her right hand was on the stock and trigger, and she began raising the rifle toward the doorway. App. at 259-60a, 607a.

When Guay saw Hegarty pick up the rifle, he yelled, "She's got a gun. Don't go." App. at 258a, 583a, 607a, 619a. However, Hines was already part-way into the cabin. App. at 216a, 583a. Hines saw Hegarty smiling and standing in a "shooting stance" with the rifle. App. at 216a. Trooper Wright was standing behind him to his right. App. at 583a. Hegarty raised the rifle toward Hines with her finger inside the trigger guard. App. at 583a.

Guay and Hines repeatedly ordered Hegarty to "[P]ut the gun down, put it down, put it down." App. at 260a, 583a, 596a, 607-08a, 619a. When Hegarty's rifle was aimed directly at the center of Hines' chest, and only after she did not comply with the officers' orders to "put the gun down," Hines and Wright fired their sidearms. Thinking that Hegarty was about to shoot Hines and Wright, Guay shot Hegarty through the cabin window. App. at 607-08a. All three officers fired at the same time. Crawford and Giroux heard what sounded like a single gunshot. App. at 152-53a, 583a, 596a, 608a, 619a.

Immediately after the shots were fired, Trooper Wright went into the cabin and checked Hegarty for vital signs. He found none. Hegarty was lying on the cabin floor with a smile still on her face. The rifle was lying across her chest. App. at 584a, 596a, 608a, 619a. After the shooting, all of the officers were upset. Hines remarked, "[W]hy didn't she just put the goddamn gun down." App. at 315a. When daylight came, the officers checked the campsite used by the four campers. Their equipment had been thrown into the stream, and some of it had bullet holes in it. Personal property belonging to the four campers was found in Hegarty's cabin. App. at 584a.

As of May 15, 1992, Hines, Guay, Crawford and Giroux all satisfied the educational and training requirements established by the Maine legislature in 25 M.R.S.A. § 2801 *et. seq.* for full-time and part-time deputy sheriffs. App. at 560a. The number of training hours they had received *exceeded* the national average. App. at 401a. Coincidentally, Crawford and Hines had attended a training session on firearms and deadly force just prior to going to the Hegarty cabin. App. at 126-27a. None of the Somerset Deputies had ever been the subject of a civilian complaint concerning a warrantless entry or a substantiated claim involving the use of excessive force. App. at 566a.

SUMMARY OF ARGUMENT

I. This case does not present any issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the appellate court's application of law to the undisputed facts.

II. Even if the Court determined that *Johnson v. Jones* applied retroactively to this case, the First Circuit's decision granting the defendant officers qualified immunity was proper.

REASONS FOR DENYING THE WRIT

The Petitioner has not satisfied the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The First Circuit Court of Appeals correctly applied the law of qualified immunity to the undisputed facts in this case when it concluded, as a matter of law, that competent police officers, possessing the same information the defendant officers had on May 15, 1992, reasonably could have believed that probable cause existed to arrest Katherine Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin.

I.

THE FIRST CIRCUIT CORRECTLY APPLIED THE CONTROLLING PRECEDENTS WHEN IT HELD, AS A MATTER OF LAW ON THE UNDISPUTED MATERIAL FACTS, THAT THE CONDUCT OF THE DEFENDANT OFFICERS WAS OBJECTIVELY REASONABLE.

A. The Standard of Review for the Officers' Immunity Claims

On a motion for summary judgment where qualified immunity is asserted, the relevant inquiry is whether "a reasonable official *could have believed* his actions were lawful in light of clearly established law and the *information the official possessed at the time of his allegedly unlawful conduct.*" *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d at 91 (citations omitted) (emphasis added). As a predicate to this inquiry, a plaintiff must establish that a particular defendant violated the plaintiff's federally protected rights. *Id.*

The mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202 (1986). The preliminary question for the Court is "whether there is any evidence] upon which a jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed." *Id.* at 251, 106 S. Ct. at 2511 (citation omitted).

A district court's denial of a claim of qualified immunity is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 "to the extent that it turns on an issue of law." *Febus-Rodriguez v. Betancourt-Lebron,* 14 F.3d 87, 90 (1st Cir. 1994). Since a defendant's entitlement to qualified immunity is a question of law in this context, appellate review is plenary. *Id.*

The appellate assessment of a qualified immunity claim has two analytic components. First, the Court must determine whether the plaintiff's rights were "clearly established" at the time of the alleged constitutional violation. *See Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. If the plaintiff's asserted right was "clearly established," the Court is required to assume that the right was recognized by the defending official. *Id.* Second, the Court must determine if a "reasonable official," situated in the same circumstances, should have understood that the challenged conduct violated that clearly established right. *See Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

B. The Qualified Immunity Doctrine

Qualified immunity protects governmental officials exercising discretionary powers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). This doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *See Hunter v. Bryant*, 502 U.S. 224, 229, 111 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (citation omitted).

Whether a defendant actually violated a plaintiff's federally protected rights is not the central issue in the qualified immunity context. "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).

With respect to Fourth Amendment claims brought pursuant

to 42 U.S.C. § 1983, the "reasonableness" of a particular use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). This "reasonableness" inquiry is an objective one. *Id.* The question, then, is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* (emphasis added).

1. *Probable Cause*

The Petitioner asserts, contrary to the undisputed evidence, that the defendant officers concluded that Katherine Hegarty "had not intended to hit the campers" when she shot at them because she "could have hit them if she had really wanted to." (Petition, p. 5). This assertion is patently incorrect. The evidence is that the officers had probable cause to arrest Hegarty for at least one felony.

Under Maine law, a "[a] person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person." 17-A M.R.S.A. § 211. The First Circuit correctly determined that an objectively reasonable officer could have concluded that Hegarty could be arrested for this offense.

As the Court has observed: " 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent

men, not legal technicians act.' " *Illinois v. Gates,* 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983) (quoting *Brinegar v. United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879 (1949)).

The campers told the defendant officers that Hegarty appeared mentally unbalanced and that she had been drinking. Given this information, an objectively reasonable officer could have concluded that Hegarty "missed" the campers precisely because she was intoxicated or mentally unstable. Common sense tells us that either one of these conditions can adversely impact upon the accuracy of someone's aim.

Furthermore, the campers took "cover" when Hegarty shot at them. The idea behind taking "cover" is to avoid being hit by a bullet. It was entirely reasonable for the officers to conclude that the campers had not been hit by a bullet precisely because their "cover" proved effective. The fact that the campers were compelled to seek "cover" when Hegarty shot at them, without more, demonstrates that she did intend to harm them. If the campers had believed they were not in danger, there would have been no reason for them to seek "cover" in the first place. The undisputed evidence is that the campers feared being shot by Hegarty. In fact, they were still visibly frightened when the officers interviewed them.

2. *Exigent Circumstances*

The Petitioner challenges the First Circuit's conclusion that a competent police officer "reasonably could have believed" that there existed probable cause to arrest Hegarty and that exigent circumstances justified an immediate warrantless entry into her cabin. (Petition, p. 18). The First Circuit rejected this argument. The Court must reject it as well.

Exigent circumstances exist when there is a "compelling necessity for immediate action that [would] not brook the delay of obtaining a warrant." *United States v. Almonte*, 952 F.2d 20, 22 (1st Cir. 1991), *cert. denied*, 503 U.S. 1010, 112 S. Ct. 1776, 118 L. Ed. 2d 434 (1992) (quoting *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980)).

In *Anderson v. Creighton*, this Court made the following observation about the standard governing summary judgment in a qualified immunity case involving probable cause and exigent circumstances:

> We have recognized that it is inevitable that *law enforcement officials will in some cases reasonably but mistakenly conclude* that probable cause is present, *and we have indicated that* in such cases *those officials* — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable. *See Malley [v. Briggs*, 475 U.S. 335], at 344-345 [106 S. Ct. 1092, at 1097-98, 89 L. Ed. 2d 271 (1986)]. *The same is true of their conclusions regarding exigent circumstances*. . . .

483 U.S. at 641, 107 S. Ct. at 3039-40 (emphasis added).

In essence, the resolution of the exigent circumstances inquiry by the Court depends upon the answers to two questions. First, what did the officers know? Second, when did they know it?

This is *what* the officers knew: that the four campers had camped on paper company property at a "registered" campsite, that Hegarty fired 30 bullets at them without provocation or justification, that her conduct toward them made the campers

think she was "wigged right out" and "flipped out," (App. at 1223a, 1233a), that she shot at the campers for over an hour, and that the campers were able to escape only by driving away "unbelievably fast" in their truck. App. at 1224a.

The officers knew that Hegarty chased the campers in her truck, that they were "scared to death" by the shooting, that they sought refuge at a truck stop, that they placed an urgent call to the Somerset Sheriff's Department for help, and that the campers were still visibly frightened when the officers interviewed them.

The officers knew that Hegarty was a registered Maine Guide with a reputation as a "crack shot," that she possessed a great many firearms, that she had a history of violence and aggressiveness toward law enforcement, that she had been involuntarily committed to a hospital for a psychotic breakdown, and that an EMT crew had to "gang tackle" and sedate her before she could be hospitalized.

The officers knew that Trooper Gary Wright had arrested Hegarty twice in one night during November 1991, that she was intoxicated when he arrested her, that she reached for a weapon in her vehicle during that arrest, that she had several weapons in her vehicle at that time, that she assaulted Trooper Wright at his house later that same night, and that she acted irrationally and made "animal noises" for an hour and a half when Deputy Guay drove her to jail after Wright arrested her.

The officers knew that Hegarty was last seen outside her cabin in a truck, that she pointed a weapon at Crawford's face at the cabin, that she committed a criminal offense when she pointed the weapon at him, that prior to that time they did not know that she was in the cabin, that they repeatedly identified themselves to Hegarty, that she personally knew two of the officers at the scene, that she refused to communicate with them despite their repeated

attempts, that she "laughed like a witch" in response to their questions, that she denied seeing anyone earlier that night, and that she refused their orders to turn the cabin lights on and exit the cabin.

The officers knew that the area around Hegarty's cabin was wide open with no cover available, that the cabin walls were "paper thin," that they could be seen in the moonlight if they attempted to retreat from the cabin, that they would have made clear targets for Hegarty if they had retreated, and that they could be shot through the cabin walls.

All of the factual information set forth above was known to the officers *before* Sergeant Hines initiated a warrantless entry in an attempt to safely separate Hegarty from her firearms. In summary, the officers knew that Hegarty was unpredictable, mentally unstable, potentially violent and quite capable of killing them. A warrantless entry was *the only* objectively reasonable option available to the officers under the circumstances confronting them on May 15, 1992.

II.

EVEN IF THE COURT DETERMINED THAT *JOHNSON V. JONES* APPLIED RETROACTIVELY TO THIS CASE, THE FIRST CIRCUIT'S DECISION GRANTING THE DEFENDANT OFFICERS QUALIFIED IMMUNITY WAS PROPER.

The Petitioner makes much of the Court's opinion in *Johnson v. Jones*, __ U.S. at __, 132 L. Ed. 2d 238 (1995). That opinion did nothing to alter the substantive law of qualified immunity. It dealt with the *circumstances* under which an immediate appeal will lie from the denial of a pre-trial motion asserting a qualified immunity defense. Even if the Court held

that *Johnson* was retroactively applicable to the instant case, the First Circuit's decision granting the officers qualified immunity was proper.

The plaintiff in *Johnson* brought a Section 1983 action against five police officers, claiming that they used excessive force when they arrested him and beat him at the police station. *Johnson*, 132 L. Ed. 2d at 243. Three of the defending police officers moved for summary judgment, arguing that the plaintiff could point to no evidence that they had beaten him or been present while two other officers did so. *Johnson*, 132 L. Ed. 2d at 243.

The plaintiff in *Johnson* rebutted the argument made by the three officers by pointing to his own deposition testimony and the deposition testimony of the three officers. *Johnson*, 132 L. Ed. 2d at 243. The plaintiff testified that the officers *had* used excessive force when they arrested him and later in the booking room at the police station. *Id.* The three officers testified that they *were* present at the scene of the arrest and in or near the booking room when the plaintiff was there. *Id.*

The district court in *Johnson* denied the officers' motion for summary judgment, noting Seventh Circuit precedent that indicated potential liability if the three officers " 'stood by and allowed others to beat the plaintiff.' " *Johnson*, 132 L. Ed. 2d at 243. Accordingly, the district court concluded that the record contained enough circumstantial evidence to support the plaintiff's theory of the case. *Id.*

The three police officers in *Johnson* immediately appealed the district court's denial of their motion for summary judgment, arguing, in relevant part, that the denial was improper because the record did not contain " 'a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff,

or ever observed anyone doing so.' " *Johnson*, 132 L. Ed. 2d at 243. The Seventh Circuit held that it lacked appellate jurisdiction over the officers' evidentiary argument that " '[they] didn't do it.' " *Id.* It therefore implicitly found that there was enough circumstantial evidence introduced by the plaintiff to raise "genuine issues" of "material fact" for trial. *Johnson*, 132 L. Ed. 2d at 243.

This Court granted certiorari to resolve a split in the circuits concerning the immediate appealability of " 'evidence insufficiency' claims made by public official defendants who assert qualified immunity defenses." *Johnson*, 132 L. Ed. 2d at 244. The Court affirmed the Seventh Circuit's ruling and held

> that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson, 132 L. Ed. 2d at 251.

The *Johnson* case stands for two simple propositions: First, if a summary judgment order determines that the pretrial record sets forth a genuine issue of material fact, a defending official claiming qualified immunity is *not* entitled to an immediate interlocutory appeal on demand. Second, if a summary judgment order determines *what* the facts *demonstrate* under "clearly established law," a defending official is entitled to an immediate interlocutory appeal. *See Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995).

The application of *Johnson* to the instant case changes nothing. The First Circuit decided a legal issue on undisputed

facts when it concluded that the defendant officers in this case were entitled to qualified immunity. Simply stated, the instant case does not involve a "sufficiency of the evidence" issue like the one raised in *Johnson.* In *Johnson* the police officers claimed that "we didn't do it." *Johnson,* 132 L. Ed. 2d at 243. In the instant case, the defendant officers acknowledged that "they did do it." The only issue before the First Circuit was whether their conduct was objectively reasonable.

The First Circuit properly concluded, on the *undisputed* evidence, that the conduct of the defendant officers was objectively reasonable. That legal determination must remain undisturbed. Only through the exercise of impermissible judicial hindsight could the Court conclude that the conduct of the defendant officers was not objectively reasonable. The doctrine of qualified immunity is designed to prevent this type of judicial second-guessing.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Opinion of the First Circuit Court of Appeals, the Petitioner's request for a Writ of Certiorari must be denied.

Respectfully submitted,

WILLIAM R. FISHER
Counsel of Record
MONAGHAN, LEAHY,
HOCHADEL & LIBBY
Attorneys for Respondents
Wilfred Hines, Rene Guay,
Tommy Giroux, Jr. and
William Crawford, Jr.
P.O. Box 7046
Portland, Maine 04112-7046
(207) 774-3906